No. 90-143

# In The

# Supreme Court Of The United States

OCTOBER TERM, 1990

**STATE OF CONNECTICUT,**
**JOHN F. DiGIOVANNI,**
*Petitioners,*

v.

**BRIAN K. DOEHR,**
*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF FOR PETITIONERS

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*State of Connecticut:*

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## QUESTION PRESENTED

Whether the Connecticut *ex parte* attachment of real estate statute, which provides for a pre-attachment, probable cause determination by a state court judge, based upon a factual affidavit; a prompt post-attachment hearing; and an immediate appeal, satisfies the due process requirements of the Fourteenth Amendment to the United States Constitution?

## LIST OF PARTIES

In the United States District Court for the District of Connecticut the plaintiffs were Roland Pinsky, Jennie Pinsky, Eileen Fedowitz and Brian K. Doehr. The defendants were Richard K. Duncan, Joseph Golden Insurance Agency, Inc. and John F. DiGiovanni.

At the time of the Second Circuit decision, Roland Pinsky, Jennie Pinsky, Eileen Fedowitz, Richard K. Duncan and Joseph Golden Insurance Agency did not continue to participate in this litigation. Therefore they are not named as parties herein.

Intervention by the State of Connecticut as a party was permitted by the Second Circuit subsequent to oral argument therein. The only proper parties to this case at this time are petitioners State of Connecticut and John F. DiGiovanni and respondent Brian K. Doehr.



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## BRIEF FOR PETITIONERS

## OPINIONS OF THE COURTS BELOW

The original Judgment and Opinion of the United States Court of Appeals for the Second Circuit is reported at 898 F.2d 852 (2d Cir. 1990) *sub nom. Pinsky v. Duncan* and is printed in the appendix to the Petition for Certiorari at Pet. App. 1A.[1] A ruling issued on April 25, 1990, granting in part and denying in part petitions for rehearing, and amending

[1] Material contained in the Joint Appendix is cited herein as "J.A. ____." Material contained in the Appendix to the Petition for a Writ of Certiorari is cited as "Pet. App. ____." The Second Circuit opinion herein is cited as *"Pinsky."*

the original judgment, is printed at Pet. App. 32A. An order refusing a suggestion for rehearing in banc was entered by the Second Circuit on May 30, 1990. Pet. App. 35A.

A modification of the ruling on Petitions for Rehearing was issued on June 25, 1990. Pet. App. 36A. An amended opinion on the Petitions, consolidating the Second Circuit's prior opinions of April 25, 1990, and June 25, 1990, was subsequently issued. Pet. App. 37A.

The memorandum of decision of the United States District Court for the District of Connecticut, Eginton J., of February 17, 1989, is reported at 716 F. Supp. 58 (D. Conn. 1989). A copy of the opinion is printed in Pet. App. 40A.

The District Court directed the entry of judgment for the defendants in that decision. Judgment was entered on February 21, 1989, and is printed in Pet. App. 45A.

## JURISDICTION

The original judgment and the opinion of the United States Court of Appeals for the Second Circuit were made and entered on March 9, 1990, and copies are printed in Pet. App. 1A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Petition for Certiorari was filed within ninety days of the ruling of partial grant and partial denial of petitioners' timely petitions for rehearing, issued by the Court of Appeals on April 25, 1990, which amended the original judgment of the Court. Pet. App. 32A. Supreme Court Rule 13.4. *Missouri v. Jenkins*, ____ U.S. ____, 110 S. Ct. 1651, 1660 (1990). *See also* 28 U.S.C. § 2101(c). This Court granted the Petition for Certiorari on October 1, 1990.



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions. U.S. Const. Amend. XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Conn. Gen. Stat. § 52-278e(a)(1):

> **Allowance of prejudgment remedy without hearing. Notice to defendant. Subsequent hearing and order.** (a) The court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as provided in sections 52-278c and 52-278d upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claim and (1) that the prejudgment remedy requested is for an attachment of real property. . .

## STATEMENT OF THE CASE

This petition arises from a civil action filed in the United States District Court for the District of Connecticut seeking, on federal due process grounds, to invalidate Conn. Gen. Stat. § 52-278e(a)(1),[2] the Connecticut prejudgment attachment of real estate statute. Jurisdiction was claimed in the District Court under 28 U.S.C. § 1331 and § 1343.

The District Court proceeding resulted from a Connecticut Superior Court civil action commenced on March 15, 1988. In the Superior Court for the Judicial District of New Haven at Meriden, John F. DiGiovanni ("DiGiovanni or Petitioner DiGiovanni") brought an action against Brian K. Doehr ("Doehr or Respondent Doehr") for an alleged assault and battery. J.A. 28A.

At the same time as the Superior Court action was instituted, and to secure the defendant's assets in the event of judgment, DiGiovanni applied for an attachment on real property of Doehr in the amount of $75,000. Pursuant to Conn. Gen. Stat. § 52-278c(a), DiGiovanni presented a judge of the Superior Court with the following: (1) an unsigned "writ, summons and complaint" setting forth his cause of action for assault and battery; (2) an application for prejudgment remedy reciting that the "prejudgment remedy requested is for an attachment of real property;" and (3) a factual affidavit of DiGiovanni demonstrating probable cause that judgment would be rendered in his favor. J.A. 23A. Pursuant to § 52-278e(a)(1), a judge of the Superior Court reviewed DiGiovanni's papers, made a finding of probable cause, and on March 17, 1988, granted the prejudgment remedy against Doehr's realty to the extent of $75,000. J.A. 26A.

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[2] For the Court's convenience, the entire chapter 903a of the Connecticut General Statutes, Revised to 1989, entitled "Prejudgment Remedies," is set forth in Pet. App. 54A through 64A. The statute at issue herein — § 52-278e(a)(1) — is found in this chapter.



Service of the attachment and complaint was made upon Doehr immediately thereafter. At that time, Doehr was given notice pursuant to § 52-278e(b) that he had a right to seek a hearing to argue that the prejudgment remedy lacked probable cause or that it should be modified or vacated. He was also informed of his right to substitute a bond and to claim exemption from execution. J.A. 30A.

Instead of taking either of these courses, Doehr, who *did* have counsel in the Superior Court, on August 8, 1988, brought suit against DiGiovanni in the United States District Court for the District of Connecticut, contending that § 52-278e(a)(1) was unconstitutional under the due process clause of the Fourteenth Amendment.[3]

Both plaintiff Doehr and defendant DiGiovanni moved for summary judgment in the District Court. J.A. 13A, 19A. The only "material facts" produced by plaintiff Doehr in accordance with Rule 56, Federal Rules of Civil Procedure and District Court local rule 9(c) were that (1) DiGiovanni had sued Doehr in state court, and (2) DiGiovanni was permitted an *ex parte* real estate attachment pursuant to § 52-278e(a)(1). J.A. 14A.

On February 16, 1989, the District Court, in response to this *facial* attack on the statute's constitutionality, granted judgment for Petitioner DiGiovanni. The statutory scheme, the Court found, provided sufficient safeguards to protect a real property owner's due process rights. Pet. App. 43A, 716 F. Supp. 58, 60 (D. Conn. 1989).

Doehr appealed this decision to the United States Court of Appeals for the Second Circuit. Jurisdiction for this appeal

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[3] Three other plaintiffs joined Doehr, challenging § 52-278e(a)(1) out of wholly separate instances of attachment by different defendants. As indicated in the List of Parties, these other plaintiffs and defendants did not participate in the Court of Appeals for the Second Circuit and are not parties herein.

was based upon 28 U.S.C. § 1291. After oral argument the Second Circuit invited intervention by the State of Connecticut under 28 U.S.C. § 2403(b).

On March 9, 1990, the Second Circuit reversed in a decision containing three opinions. Judge Pratt concluded for the Court that § 52-278e(a)(1) was unconstitutional in violation of due process because the statute permits attachments without prior notice and hearing in the absence of "extraordinary circumstances" and separately found unconstitutionality because the attaching party is not required to post an attachment bond. 898 F.2d at 858. Pet. App. 15A-16A.

Judge Mahoney, who found the conclusion "not entirely free from doubt," 898 F.2d at 859, Pet. App. 17A, concurred only in Judge Pratt's rationale regarding the lack of notice and hearing. He did not agree that a lack of a bond was a due process violation, as there were civil remedies which a debtor might pursue to recover for wrongful attachment. 898 F.2d at 860, Pet. App. 17A.

Judge Newman concluded in dissent that § 52-278e(a)(1) entirely satisfied due process, citing a unanimous opinion of the Connecticut Supreme Court and three individual United States District Court decisions from Connecticut to support his view. 898 F.2d at 864, Pet. App. 31A.

In response to timely petitions for rehearing filed by petitioners, the Second Circuit, on April 25, 1990, granted the petitions to the extent of making its March 9, 1990, holding prospective in effect. The remainder of the relief sought in the petitions was denied. Pet. App. 32A. On June 25, 1990, the Court modified its April 25, 1990, ruling to make the original opinion retroactive to cases challenging the constitutionality of the Connecticut statute filed prior to March 9, 1990, and still pending on that date. Pet. App. 36A.



## SUMMARY OF ARGUMENT

Chief Justice Rehnquist has observed that a court should disdain empanelling "a roving commission" to survey the statute books, striking down state laws on mere "musings" and in hypothetical situations. *Secretary of the State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 976 (1984).

Yet this is precisely the result of the holding of the Second Circuit in this case. The Court of Appeals has invalidated a Connecticut statute which allows real estate to be attached *ex parte*, but only on a determination of probable cause by a judge before attachment and with a right to an immediate hearing thereafter. Without the slightest indication of harm to respondent, who did not even attempt to avail himself of the protections afforded him by the statute, the Court of Appeals has concluded that there is a due process deprivation of property rights in *all* instances, merely because a full evidentiary hearing is not provided prior to attachment. This holding is overly restrictive and is not in keeping with precedent.

The petitioners' argument revolves around three key points. First, the hearing requirement of due process is a flexible one which does not always require a pre-deprivation hearing.

> "[W]here the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous determination," a prior hearing may not be required.

*Zinermon v. Burch*, ____ U.S. ____, 110 S. Ct. 975, 984 (1990) (quoting *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 19 (1978)).

This Court has suggested that the proper test for judging procedural due process violations, such as the right to a prior hearing, is to be found in *Mathews v. Eldridge*, 424 U.S. 319

(1976). The Connecticut statute passes this test. The interest of the property owner is only a temporary cloud on his title which might affect his ability to transfer his realty. On the other hand, the risk of an erroneous deprivation has been minimized by the safeguards provided by the statute: a probable cause determination by a judge before attachment, based on a factual affidavit; an immediate full hearing upon request subsequent to attachment in which the probable cause finding may be reversed and the attachment dissolved; and an immediate appeal. These safeguards satisfy the *Mathews* Court's concerns. No substantial additional protections would be obtained by the additional requirement of a prior hearing.

Next, an examination of the four leading prejudgment attachment cases in this Court, all of which concerned personalty, provide support for petitioners' position. *See Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969) (wage garnishment illegal without prior hearing); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (replevin statutes unconstitutional as they allow seizure of chattels without hearing); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (sequestration statute constitutional where there were safeguards including judicial control of the process); and *North Georgia Finishing, Inc. v. DiChem, Inc.*, 419 U.S. 601 (1975) (garnishment statute which allowed seizure of bank account without "early hearing" unconstitutional).

Taken as a whole, these four cases illustrate that normally there is no need for a prior hearing under the due process clause where there exist "saving characteristics" to protect the debtor. All of these characteristics may be found in Connecticut's prejudgment remedy statute.

Finally, petitioners ask this Court to approve what many of the Circuit Courts of Appeals have previously indicated: that under *Mitchell* and *DiChem*, the *Fuentes* rule — which appeared to require extraordinary circumstances, such as national emergency, before creditors could attached *ex parte* — has been replaced by a more balanced test which now looks to the measures taken under state law to safeguard the property owners.



## ARGUMENT

### I. CONNECTICUT'S PROCEDURE FOR ATTACHMENT OF REALTY SATISFIES DUE PROCESS BECAUSE OF THE STATUTORY SAFEGUARDS PROVIDED.

#### A. THE DUE PROCESS HEARING REQUIREMENTS.

The strictures of the due process clause[4] call for a hearing before one is *finally* deprived of a property interest. *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974). The hearing required to satisfy due process must be given "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

[4] The Ninth Circuit and some District Courts have held that the due process clause is not applicable at all to real estate attachments due to the limited nature of the interference with property rights. *See Matter of Northwest Homes of Chehalis, Inc.*, 526 F.2d 505 (9th Cir. 1975), *cert. denied sub nom. Hansen v. Weyerhaeuser Co.*, 425 U.S. 907 (1976); *Central Sec. Nat. Bank v. Royal Homes, Inc.*, 371 F. Supp. 476 (E.D. Mich. 1974); *In re Oronoka*, 393 F. Supp. 1311 (D. Maine 1975). This approach relies upon this Court's summary affirmance in *Spielman-Fond, Inc. v. Hanson's Inc.*, 379 F. Supp. 997 (D. Ariz. 1973), *aff'd* 417 U.S. 901 (1974) (no due process protection in the placing of a mechanics lien). The Court in *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1323 (3rd Cir. 1982) has pointed out that *Spielman-Fond* has not been undercut by subsequent decisions of this Court. *See also B & P Development v. Walker*, 420 F. Supp. 704 (W.D. Pa. 1976). The concurring and dissenting judges in *Pinsky* believed that the due process clause called for *some* degree of protection for the property owner. 898 F.2d at 859, 862, Pet. App. 17A, 26A.

The clause does not mandate, however, a pre-deprivation hearing in all cases.[5] Rather due process "is flexible and calls for such procedural protections as the particular situation demands . . . [N]ot all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Thus, just this last term, this Court in *Zinermon v. Burch*, ___ U.S. ___, 110 S. Ct. 975, 984 (1990) (quoting *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 19 (1978)), declared as regards the timing of hearing:

> "[W]here the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous determination" a prior hearing may not be required.

*See also Ingraham v. Wright*, 430 U.S. 651, 678-680 (1977) (prior hearing not required where there are other adequate protections).[6]

Citing much of the above precedent, this Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) set forth the following test[7] to determine whether a procedural due process

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[5] The inflexible approach of the Second Circuit majority in *Pinsky* is clearly erroneous. It requires a prior hearing in virtually *all* instances, regardless of safeguards provided or absence of harm to the debtor. 898 F.2d at 854, Pet. App. 7A.

[6] One writer has summarized this precedent as follows: "Recently, however, even in cases where there were *no* conflicting rights in the 'life, liberty, or property' for which an individual sought protection by means of a prior hearing, the Supreme Court has indicated a reduced concern about the intrinsic and instrumental benefits of a prior as opposed to a subsequent hearing . . . so long as the alternative procedures offered by the government are shown to produce substantially accurate results." (Emphasis in original.) L. Tribe, *American Constitutional Law* (2d ed. 1988) at 724.

[7] This test was employed by a thoughtful District Court opinion upholding the constitutionality of § 52-278e(a)(1), *Shaumyan v. O'Neill*, 716 F. Supp. 65 (D. Conn. 1989) and by both the Court and dissenting judges in *Pinsky*, 898 F.2d at 856, 863, Pet. App. at 10A, 28A.



violation, including the failure to afford a pre-attachment hearing, might have occurred:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

As demonstrated below, Connecticut's real estate attachment mechanism satisfies this test as well as the approach to due process taken in other opinions of this Court.

## B. CONNECTICUT'S PREJUDGMENT REMEDY STATUTE FOR REAL ESTATE SATISFIES PROCEDURAL DUE PROCESS.

A mechanism to obtain a prejudgment real estate attachment has existed in Connecticut since colonial times.[8] Although earlier statutes permitted attachment merely on an attorney's signature,[9] the current statute sets forth numerous protections to meet due process concerns.

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[8] The process of serving the defendant with a writ of attachment and leaving a copy of the writ with the town clerk where the land lies is mentioned by Zephaniah Swift in his *System of the Laws of the State of Connecticut*, Vol. II, page 190 (1796). *See also Barber v. Morgan*, 84 Conn. 618, 622, 80 A. 791 (1911).

[9] *See E.J. Hansen Elevator, Inc. v. Stoll*, 167 Conn. 623, 356 A.2d 893 (1975). This procedure was terminated by the state legislature after this Court's decision in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972) (challenge to garnishment without notice may be pursued under the civil rights laws).

In his dissent in *Pinsky*, Judge Newman accurately describes the provisions of the Connecticut law as follows:

> Connecticut permits any person starting a lawsuit to file on the land records an attachment of the real property of the defendant. Conn. Gen. Stat. § 52-278e(a)(1). This prejudgment remedy assures the plaintiff a source of funds in the event the lawsuit is successful. To obtain this attachment the plaintiff must present sworn evidence sufficient to persuade a state court judge at an ex parte hearing that probable cause exists to believe that the lawsuit will be successful. *Id.* If an attachment is permitted, the defendant is entitled to an "expeditious" adversary hearing at which the attachment will be dissolved unless the plaintiff establishes probable cause in the context of an adversary hearing. *Id.* § 52-278e. Connecticut permits appellate review of an order denying a motion to dissolve an attachment. *Id.* § 52-278l(a). To assure that a defendant becomes aware of his right to challenge an ex parte real estate attachment, Connecticut requires the attaching plaintiff to serve the defendant with notice of his right to a hearing to challenge the claim of probable cause, to request that the attachment be vacated or modified, or that a bond be substituted, or to claim exemption from attachment. *Id.* § 52-278e(b). Connecticut also permits a defendant to recover double damages for commencing a civil lawsuit without probable cause. *Id.* § 52-568(a)(1) (West Supp. 1989).

898 F.2d at 861-862, Pet. App. at 24A-25A.[10]

The present facial challenge to this statutory scheme is without merit. Under the *Mathews* balancing test, the interest to be protected — *i.e.*, the owner's interest in his property — is not seriously affected by the postponement of

[10]The entire chapter is set forth at Pet. App. 54A-64A.



an adversary hearing to immediately after the placing of an attachment lien on the land records. Unlike the situation where personal property is seized, in the present case there is *no* physical invasion of the property at interest at all. In fact, the filing of an attachment lien on the land records results in no interference with the property owner's use and enjoyment of his realty.

At most, such an attachment creates a temporary cloud on the title, which would affect the owner at all *only* if he intended to market the property at the time the attachment was placed. Even in that instance, Connecticut provides that such an owner can post a bond in court or substitute other property or place funds in escrow in order to release the attachment and sell the property.[11]

Since the Connecticut statute already provides for an immediate post attachment hearing at which the attachment may be reduced or dissolved, the sole possible "deprivation" for the landowner is a temporary impairment of his ability to transfer title outright for the brief period between the time the attachment is placed and the time of the hearing immediately thereafter. As Judge Newman said in dissent in *Pinsky*:

> The Due Process Clause is not a code of civil procedure. It assures that no state will "deprive" any person of "property" without "due process of law." U.S. Const. amend. XIV. An ex parte prejudgment attachment of real estate does not deprive the owner of any possessory rights in his property. At most, it impairs the market value of the property during the brief interval between the ex parte attachment and the "expeditious" adversary hearing required by state law. If the owner has no plans to sell the property or borrow upon it during that interval, the ex parte attachment has caused him no adverse

[11]On posting bond or substitution of other property, *see* Conn. Gen. Stats. § 52-278e(b) and § 52-304.

> consequence. If, during that interval, he wishes to realize the full market value of his property, he may replace the attachment with a bond.

898 F.2d at 862, Pet. App. 25A-26A (footnote omitted).

In any event, respondent Doehr has not claimed or established any harm herein. Indeed, he never even requested a hearing in Superior Court in order to vacate the attachment under the statutory mechanism. Instead he brought this constitutional challenge to the statute directly in Federal District Court.

Under the second *Mathews* factor, Connecticut has established elaborate safeguards to protect the attached party and substantially reduce the risk of an erroneous deprivation, including an independent determination of probable cause by a Superior Court judge based on a factual affidavit, and an immediate post-attachment adversary hearing. These standards should also fulfill the third point of *Mathews*. The public interest is satisfied by even-handed legislation which allows a creditor or other claimant to obtain a remedy through the state court system and at the same time provides protection from arbitrary action or from imposition of serious harm on the affected party.

The further imposition of prior notice and evidentiary hearing would not significantly improve the protection for the debtor, and could result in harm to a legitimate creditor if the debtor managed to transfer title to his property after receiving notice of the proposed attachment, but before the hearing was held. The present statutory scheme serves the legitimate interests of both sides and, as such, satisfies the requirements of due process.

This Court has previously upheld, moreover, a virtually identical Connecticut statute which permits a lis pendens to be placed *ex parte* upon the land records, followed by an immediate hearing if requested by the landowner. Conn. Gen.



Stat. §§ 52-325, 52-325a, 52-325b were initially sustained by the Connecticut Supreme Court in *Williams v. Bartlett,* 189 Conn. 471, 457 A.2d 290 (1983). The Connecticut court had sustained these statutes, not on the grounds of any specific interest a creditor may have in the realty,[12] but by applying the *Mathews* test finding that "the minimum requirements of procedural due process" had been met. *Id.* 189 Conn. at 480-481, 457 A.2d at 294-295.

On appeal, the question presented to this Court was stated as follows:

> Is Fourteenth Amendment procedural due process satisfied when only protection afforded owner of land sequestered under lis pendens statute is post-sequestration hearing?

*See* 52 U.S. Law Week 3036 (August 2, 1983). This Court summarily affirmed by dismissing the appeal. *Bartlett v. Williams,* 464 U.S. 801 (1983). In the case of both lis pendens and real estate attachments, the interference with an interest is identical (marketability is affected), and the interference with enjoyment is not so severe that a prior hearing is mandated.

The Connecticut statute thus satisfies the *Mathews v. Eldridge* test. *See also Zinermon, supra,* at 19.

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[12] *Cf.* Judge Mahoney in *Pinsky,* 898 F.2d at 860, Pet. App. at 20A.

## II. THE COURT'S PRIOR DECISIONS REGARDING *EX PARTE* PREJUDGMENT REMEDIES SUSTAIN THE CONSTITUTIONALITY OF CONNECTICUT'S REAL ESTATE ATTACHMENT STATUTE.

This Court has on four separate occasions ruled on the constitutionality of *ex parte* attachments and like remedies. None of these decisions concern attachment of realty. They do point out, however, the differences between the degree of interference with property rights which existed in these prior cases involving personal property and that which occurs in this case. The four decisions of the Court, read as a whole, also set forth the safeguards needed to sustain personal property attachments. There is no reason why these safeguards should not be applicable to sustain *ex parte* real estate attachments as well.

The first of these cases — *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969) — struck down as violative of due process a Wisconsin law which froze wages until trial and did not allow a prior hearing. The Court was careful to note, however, that "[a] procedural rule that may satisfy due process for attachments in general, see McKay v. Innes, 279 U.S. 820, does not necessarily satisfy procedural due process in every case." *Id.* at 340.

In *Sniadach*, the prior hearing was compelled by the fact that *wages* were at issue — "a specialized type of property presenting distinct problems in our economic system." *Id.* The wage earner might be driven "to the wall" by a prejudgment garnishment. *Id.* at 342.[13] A real estate attachment, which involves no physical removal of the property at all, is hardly analogous. *Sniadach*, taken alone, thus provides no direct precedent for striking down Connecticut's statute.

[13]A prejudgment attachment of wages is entirely prohibited in Connecticut. *See* Conn. P.A. 90-149 (eff. October 1, 1990) attached as an appendix to this brief.



The second case decided by this Court, relied upon heavily by the majority in *Pinsky*,[14] is *Fuentes v. Shevin*, 407 U.S. 67 (1972). In *Fuentes*, decided in the absence of two justices on a 4-3 vote, the Court struck down replevin statutes because "they deny the right to prior opportunity to be heard before chattels are *taken* from their possessor." (Emphasis added.) *Id.* at 96. In one instance a creditor had repossessed a stove and stereo; in another a bed, a table, and other household goods. *Id.* at 70, 71. These seizures were especially harsh, the Court noted, because the goods were "dearly bought and protected by contract . . . ." *Id.* at 86. This is hardly the situation with a prejudgment real estate attachment which results in *no* physical deprivation of property at all.

The extent of *Fuentes* was limited just two years later in *Mitchell v. W.T. Grant Company*, 416 U.S. 600 (1974).[15] The *Mitchell* court had before it a statute allowing the sequestration of a debtor's property from the commencement of the action until after trial. Acknowledging the flexibility of the due process analysis, the Court sustained the Louisiana statute. Indeed "[t]he usual rule has been '[w]here only property rights are involved, mere postponement of the judicial enquiry is not denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.' " *Id.* at 611, quoting *Phillips v. Commissioner*, 283 U.S. 589, 596-7 (1931).

Unlike the statute in *Fuentes*, the *Mitchell* statute had several protective measures — an affidavit requiring a statement of specific facts, not generalities; judicial control of the process "from beginning to end;" the right to sue for damages if wrongly issued; and the right to a post-seizure hearing.

[14]*See, e.g.*, 898 F.2d at 854, Pet. App. at 7A.

[15]Justice Powell nicely summarizes *Fuentes* in *Mathews, supra* at 335, as follows: "[T]he Court only said that in a replevin suit between two private parties the initial determination required something more than an *ex parte* proceeding before a court clerk."

When *Fuentes* was again cited in *North Georgia Finishing, Inc. v. DiChem, Inc.*, 419 U.S. 601 (1975), it was used along with *Mitchell* to strike down a Georgia garnishment statute which "ha[d] none of the saving characteristics of the Louisiana statute." *Id.* at 607.

> Here, a bank account, surely a form of property, was impounded and, absent a bond, put totally beyond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer. *Id.*

Connecticut's real estate prejudgment remedy statute at issue, § 52-278e(a)(1), does not involve the harm of total deprivation which occurs in a physical seizure of personal property. The statute, in any event, meets the standards of both *Mitchell* and *DiChem*. Connecticut, in fact, has attempted, in enacting § 52-278e, to follow the *DiChem* holding.[16] In this regard, one need only look to the language of the Connecticut Supreme Court in *Fermont Div., Dynamics Corp. of America v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979) which exactly tracks *DiChem* in finding the statute constitutional.[17]

Justice Peters[18] declared:

> Section 52-278e exhibits *all the saving characteristics* that the law of procedural due process requires. The statute provides for adequate judicial supervision of the entire process of seizure, and does not permit writs to be issued by a court clerk. The statute can be invoked only by a verified affidavit that contains factual, rather than merely conclusory, supporting allegations. Most important, the statute affords to the defendant whose property has been attached the opportunity to obtain an immediate postseizure hearing at which the prejudgment remedy will be dissolved unless the moving party proves probable cause to sustain the validity of his claim.

*Id.* at 396-398, 423 A.2d at 83. (Emphasis added.)

To the *Fermont* Court the lack of a prior hearing is not fatal where these safeguards exist. *Id.*[19]

Under the line of this Court's attachment decisions, the Connecticut statutory scheme passes constitutional muster.

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[16]In *Mitchell* this Court also showed concern that the sequestration process not be abused by noting the shared interest of debtor and creditor in the property. This factor does not appear in the list set forth in *DiChem*. Moreover the numerous safeguards of the Connecticut statute are adequate to protect the property owner in the context of Connecticut's real estate attachment procedure.

The Court in *Pinsky* opined that a difference might be found between the earlier attachment statutes and Connecticut's statute because Connecticut's statute allowed a remedy for a tort claimant. But there has been no showing that the probable cause review and subsequent hearing will not on its face function correctly in the context of a tort. Judges regularly make findings of probable cause in the course of their criminal function.

[17]As stated earlier, prior to 1973, real estate attachments were issued by attorneys as commissioners of the Superior Court at the commencement of suit without notice. In 1973 the Connecticut General Assembly enacted legislation mandating a prior hearing in all instances. P.A. 73-431, § 5. In 1976, following *DiChem*, the current statute was passed, obviating the prior hearing requirement for realty, provided the *DiChem* safeguards were met. P.A. 76-401, § 2.

[18]Honorable Ellen Ash Peters is now the Chief Justice of the Connecticut Supreme Court.

[19]Although a creditor's bond or other security is not a prerequisite to due process, it is noted that Connecticut law provides for double damages for wrongful attachment § 52-568(a). The claim for damages may be brought as a counterclaim to the suit seeking attachment. The concurring and dissenting judges in *Pinsky* held this sufficient protection, 898 F.2d 860, 864 Pet. App. 21A, 29A, and the respondent did not seek review of that holding.

## III. THERE IS NO REQUIREMENT FOR A PRIOR HEARING IN ALL CASES EXCEPT FOR EXTRAORDINARY CIRCUMSTANCES.

The Respondent has argued, and the majority below agreed that, in Judge Pratt's words, "a prior hearing may be postponed [only] where exceptional circumstances justify such a delay, *and where* sufficient additional safeguards are presented." 898 F.2d at 855, Pet. App. 8A (emphasis in original). The exceptional circumstances recognized by the fragmented *Pinsky* court include action taken in national emergencies or the seizing of misbranded drugs. *Id.* This view is clearly a wrong interpretation of procedural due process.

The approach of the Second Circuit in *Pinsky* is drawn from *Fuentes* alone without consideration of the subsequent cases of *Mitchell* and *DiChem, supra. Mitchell* did not mention extraordinary circumstances in sustaining the Louisiana statute, nor did *DiChem* fault the Georgia statute on the ground that it permitted seizures in *any* situation without a prior hearing.

Indeed *DiChem* is careful to emphasize that the hearing required is an "early" one, not a prior one, *DiChem* at 606, which is precisely what the Connecticut statute provides. Again *DiChem* stresses that the debtor was entitled to notice and a hearing "*or* other safeguard" in connection with the seizure. *Id.* (emphasis added).

The approach, post *Fuentes*, is to concentrate on the *safeguards* available at the time of the deprivation. The "sine qua non" prior hearing rationale of *Fuentes* is inappropriate



even to the actual seizure of personalty and more so to attachment of realty.[20]

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[20]Numerous federal courts have held that *Fuentes* has been modified by subsequent cases. *See, e.g., Jonnet v. Sav. Bank of the City of New York*, 530 F.2d 1123 (3rd Cir. 1976) (extraordinary circumstances not controlling); *Hutchinson v. Bank of North Carolina*, 392 F.Supp. 888, 895, note 8 (M.D.N.C. 1975) ("we feel that *Mitchell* and *DiChem* have repudiated *Fuentes* to the extent that a new (really traditional) approach to an analysis of due process has been developed and our decision reflects this new approach"); *Guzman v. Western State Bank of Devils Lake*, 516 F.2d 125, 128 (8th Cir. 1975) (*Fuentes* limited by *Mitchell*); *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526, 535, n.16 (5th Cir. 1978) ("extraordinary circumstance" *not* mandated); *Matter of Northwest Homes of Chehalis, Inc., supra*, at 507 (*Mitchell* and *DiChem* establish standards to judge post-attachment hearing).

## CONCLUSION

The Connecticut statute at issue, § 52-278e(a)(1), satisfies the *Mathews v. Eldridge* balancing test and includes the *DiChem* saving characteristics necessary to satisfy due process. No more is constitutionally required. Therefore, the opinion and judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted.


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November, 1990



No. 90-143

# In The

# Supreme Court Of The United States

OCTOBER TERM, 1990

**STATE OF CONNECTICUT,**
**JOHN F. DiGIOVANNI,**
*Petitioners,*

v.

**BRIAN K. DOEHR,**
*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## APPENDIX

Senate Bill No. 265
**PUBLIC ACT NO. 90-149**

AN ACT CONCERNING
PREJUDGMENT ATTACHMENT.

Section 1. Section 52-329 of the general statutes is repealed and the following is substituted in lieu thereof:

When the effects of the defendant in any PROPOSED OR PENDING civil action in which a judgment or decree for the payment of money may be rendered are concealed in the hands of his agent or trustee so that they cannot be found or attached, or when a debt OTHER THAN EARNINGS, AS DEFINED IN SUBDIVISION (5) OF SECTION 52-350a, is due from any person to such defendant, or when any debt, legacy or distributive share is or may become due to such defendant from the estate of any deceased person or insolvent debtor, the plaintiff may insert in his writ, subject to the provisions of sections 52-278a to 52-278g, inclusive, a direction to the officer to leave a true and attested copy thereof and of the accompanying complaint, at least twelve days before the return day, with such agent, trustee or debtor of the defendant, or, as the case may be, with the executor, administrator or trustee of such estate, or at the usual place of abode of such garnishee; and from the time of leaving such copy all the effects of the defendant in the hands of any such garnishee, and any debt due from any such garnishee to the defendant, and any debt, legacy or distributive share, due or that may become due to him from such executor, administrator or trustee in insolvency, not exempt from execution, shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover.

Sec. 2. Section 52-278b of the general statutes is repealed and the following is substituted in lieu thereof:

Notwithstanding any provision of the general statutes to the contrary, no prejudgment remedy shall be available to

a person in any action at law or equity *(1)* unless he has complied with the provisions of sections 52-278a to 52-278g, inclusive, except an action upon a commercial transaction wherein the defendant has executed a waiver as provided in section 52-278f, OR (2) FOR THE GARNISHMENT OF EARNINGS AS DEFINED IN SUBDIVISION (5) OF SECTION 52-350a.

Sec. 3. Section 52-278e of the general statutes is amended by adding subsection (d) as follows:

(NEW) (d) No prejudgment remedy for the attachment of real property of a municipal officer may be granted pursuant to this section in any civil action against such officer for an act or omission, not malicious, wanton, wilful or ultra vires, on the part of such officer while acting in the discharge of his duties where such officer would be protected and held harmless from financial loss and expense under the provisions of section 7-101a.